



OFFICE OF THE ATTORNEY GENERAL OF TEXAS

AUSTIN

GERALD C. MANN  
ATTORNEY GENERAL

Honorable Geo. H. Sheppard  
Comptroller of Public Accounts  
Austin, Texas

Dear Mr. Sheppard:

Opinion No. O-2612

Re: Authority of the Comptroller of Public Accounts to approve the issuance of warrant in payment of purchase by the State Board of Vocational Education chargeable to the Federal Rehabilitation Fund in the absence of approval of such purchase by the Board of Control.

Your request for a legal opinion is as follows:

"I am attaching hereto claim of C.H.. Stoelting Company for goods sold to the State Board of Vocational Education drawn against the Federal Rehabilitation Fund appropriated for the use of the State Board of Vocational Education and request that you advise this department whether or not this claim requires the approval of the State Board of Control before the Comptroller is authorized to issue warrant in payment for same.

"In connection with this request I am attaching two Attorneys General Opinions, written by a former administration, and a copy of 'Instructions to State Unemployment Compensation Agencies Relative to Fiscal Affairs in Connection With Grants Made for Expenses of such Agencies Pursuant to Title III of the Social Security Act.'"

Article 634 of the Revised Civil Statutes provides:

"The Board of Control shall purchase all the supplies used by each Department of the State Government, including the State Prison

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System, and each eleemosynary institution, Normal school, Agricultural and Mechanical College, University of Texas, and each and all other State schools or Departments of the State Government heretofore or hereafter created. Such supplies to include furniture and fixtures, technical instruments and books, and all other things required by the different departments or institutions, except strictly perishable goods."

We have several times held that this statute evidenced a State policy that supplies, equipment and like things required by the different departments or institutions of the State should be purchased upon contract made by the Board of Control. Copies of these opinions have in most instances been given to you, and, of course, are in your files.

There is no occasion for departure from this established rule in the absence of some statutory authority, either expressly given, or by necessary implication.

The Legislature by Acts of the 43d Legislature (1933) 1st. C. S. p. 274, ch. 99, § 1, has provided:

"The Legislature of Texas does hereby accept the provisions and benefits of an Act of Congress passed June 2, 1920, amended June 5, 1924, entitled: 'An Act to provide for the promotion of Vocational Rehabilitation of persons disabled in industry or otherwise, and their return to civil employment.'

"2. The Treasurer of Texas be, and he is hereby authorized and empowered to receive the funds appropriated under said Act of Congress, and is authorized to make disbursements therefrom upon the order of the State Board of Vocational Education. The State Board of Vocational Education is empowered and instructed to co-operate with the terms and conditions expressed in the Act of Congress aforesaid.

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"Sec. 2-a. The Vocational Rehabilitation Division, through the Supervisor of Rehabilitation, is authorized to receive gifts and donations for rehabilitation work, said gifts and donations to be deposited by the Supervisor of Rehabilitation in the State Treasury, subject to the matching of same with Federal Funds up to such amount as the Federal Government may allocate per biennium to the State for said work, and which has not already been met with state appropriations for said biennium."

This Act, in our opinion, does not repeal the prior Act (Article 634) above quoted. There has been no express repeal, and repeals by implication are not favored and will not be permitted except where the two Acts speak with respect to the same subject matter, and are so inconsistent as that both may not stand as the law upon the subject at the same time.

The language of Article 2675-1, § 2 most nearly in conflict with Article 634 is, "the Treasurer of Texas \* \* \* is authorized to make disbursements therefrom (funds appropriated under the Act of Congress) upon the order of the State Board for Vocational Education." There is no real conflict, it is only apparent.

Article 634 does not undertake to clothe the Board of Control with final discretion in the matter of need of our institutions and departments for supplies or equipment, it merely requires when that need is shown to the Board of Control by proper request for requisition, the contract for the purchase of such supplies or equipment is to be made by the Board of Control rather than by the department or institution making the requisition. This is especially true in those cases where, as here, the final discretion as to need is in the department or institution making the requisition.

Both Articles of the statute can stand, and should stand, and be given full force and effect. By doing so, the State's policy to require all departmental and

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institutional supplies and equipment to be purchased through the Board of Control as a contract agency is respected, without lessening the power of the State Board for Vocational Education, as provided in Article 2675-1, § 2. The central purchasing agency is an economical policy only.

Neither does the holding above indicated impair or in anywise disrupt the harmonious cooperation between the Office of Education of the United States and the State of Texas through its State Board of Vocational Education. A careful reading of Vocational Division Bulletin No. 113, revised 1938, issued by the United States Department of Interior, confirms the correctness of our conclusion as the question of cooperation between the authorized agencies is concerned.

That wholesome cooperation contemplated and demanded by the Office of Education, and expressly granted and reciprocated by the Legislature of Texas, pertains to the larger and humane work of distributing funds appropriated by the United States for vocational rehabilitation.

We will next consider whether or not the Board of Control whose duty it is as we have seen to make purchases for the various state institutions and departments, may by approval of the claims of persons who have made sale of supplies or equipment directly to an institution or department without the purchase having been made by the Board of Control, so that such claims may be passed by the Comptroller for warrant in any event, and if so in what cases or under what circumstances such belated approval by the Board of Control will authorize the payment of such a claim.

Article 634a of the Revised Civil Statutes is as follows:

"Sec. 1. The Board of Control shall in all public contracts to be let or awarded by it invite bids and furnish proposals to those desirous of bidding on such forms as it may deem proper. Said Board may place any person, firm or corporation so desiring on a State mailing

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list which said list shall entitle said holder to a copy of the proposal on any contract that is to be let. To be entitled to receive such State mailing list, said holder shall first pay in advance an annual service charge to be determined by the Board of Control, which same shall not be less than Five (\$5.00) Dollars nor more than Seven Dollars and Fifty (\$7.50) Cents.

"Sec. 2. Where any bidder or prospective bidder, other than those appearing on said State mailing list, desires to bid on any contract to be let by said Board, he shall pay such amount for the proposal or proposals furnished to him, as said Board may determine is just and necessary; provided, however, in the event said Board finds that a service charge may work a hardship on some particular bidder or class of bidders, it may forego such charge and shall be authorized to furnish such proposals.

"Sec. 3. All amounts collected from the annual service charge of those on the State mailing list or from proposals furnished shall be deposited in the State Treasury in the name of the 'State Board of Control Special Service Account,' and enough of said funds so collected shall be used by said Board and paid out as other funds are to defray all necessary expenses and charges in connection with the making and furnishing of said proposals."

Article 631 of the statutes provides for the appointment of a chief of the division of purchasing, and subsequent articles further regulate the manner of making purchases by the Board.

These various statutes make it clear that the method of purchasing supplies and equipment prescribed by the statutes is mandatory with the exceptions contained in Articles 634, 660 and perhaps other pertinent statutes. In other words, the Board of Control itself has no authority to make purchases except in the manner prescribed by

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these statutes.

In *Sluder vs. City of San Antonio*, 2 S. W. (2) 841, the Supreme Court held through an opinion written by the Commission that a city having entered into a contract in a manner not authorized by law which contract was therefore void should be held liable upon a quantum meruit where it received the benefit of the contract, the contract being one which the city had general power to make if it had pursued the required formalities. It was pointed out this was not making valid the original void contract, but the liability was predicated upon the legal conception of an implied agreement to pay for the value of the performance by the other party which had been accepted by the city.

It is elementary law that where one without authority so to do executes an instrument in the name of another that other may by adoption or ratification make the contract his own, and will of course be bound by its terms. A void contract, however, may not be galvanized into life by ratification, approval or adoption whatsoever. There is no question of ratification involved in the present situation since the contract was not the purported contract of the Board of Control but was one executed by the State Board of Vocational Education through its director. Such contract is invalid and void in that the State Board of Vocational Education had no power to make such a contract. It could not, therefore, have validity imparted to it by any act of the Board of Control whatsoever.

In such a case the Board of Control by approving the purchase and sale claim thus unlawfully attempted makes the transaction its own purchase within the meaning of Article 634 of the Statutes where the transaction was one the Board itself could have made in the manner attempted by the institution. The effect of such approval of the claim would be to make the purchase that of the Board of Control in substantial compliance with the requirement of Article 634 of our statutes. The validity of such claim would be predicated upon the act of the Board in making the purchase its own, and not upon any imparted validity to the original void undertaking of the institution.

From what we have said it would follow that the Board of Control would have no authority to approve a claim

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for a purchase not made in accordance with the mandatory provisions of the statute. Specifically, the Board of Control would have no authority to approve such a claim where the purchase was one required by the statutes to be upon competitive bids. It could only be effective in those cases where the purchase was one which the Board of Control itself could have made in the manner attempted by the institution.

In this connection we are of the opinion that if these items of equipment or supplies were of such nature as that competitive bids would be impossible the law would have no application to such a case. It does not require an impossible thing.

If the items of purchase in the present case were such as that the purchase should have been made upon competitive bids, then the Board of Control would have no authority to approve the audit for payment. If, on the other hand, the items were of such nature as that the Board could have purchased them without competitive bids, then the Board in its discretion would have the authority to approve the claim the effect of which approval would in our opinion be a substantial compliance with the statutes of purchase and would entitle the claim to be passed for a warrant of payment.

We have not considered, and express no opinion as to a case where the supplies involved have been consumed at the time the Board is called upon for an approval of the claim. Such a case is not before us.

Yours very truly

APPROVED AUG 27, 1940

ATTORNEY GENERAL OF TEXAS

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TS:MR

